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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 838

NELLIE C. BOSTWICK, ET AL.,

Petitioners,

vs.

BALDWIN DRAINAGE DISTRICT, ET AL.,

Respondents

REPLY BRIEF FOR PETITIONERS

The short brief for Respondents contains much error of fact and of law.

Error as to Parties and the Purpose of Such Error

At pages 1, 6, 7 and 8 of Respondent's brief it is asserted that "Two of the petitioners" were parties plaintiff in the *Macclenny Turpentine Company* case. That is untrue. At other places, such as page 4 of Respondent's brief, it is asserted that "petitioners" (meaning petitioners now before this Court) in the *Macclenny Turpentine Company* case did this and that. Again untrue. The record in the *Macclenny Turpentine Company* case brought to this Court when certiorari was denied January 15, 1945, 89 L. Ed. (Adv. 415), shows, page 1, that there were *Eleven* plaintiffs in that case and that Mrs. Bostwick

derived the small acreage of property which she claimed in that case from entirely different sources—part of it through a State Tax Deed issued in 1937. All this counsel for Respondents well knew because he was counsel for Defendants in that case and has a copy of the printed record filed in this Court.

In this particular case (C. C. A. #11347) there are Eight petitioners, Mrs. Bostwick, Jacksonville Heights Improvement Company, and six heirs of P. F. McDermott. See page 1 of the Petition. The Notice of Appeal to the Fifth Circuit Court of Appeals and the Statement of Points, Vol. II, pp. 51, 53 show that the appellants in those four cases listed Vol. II, pp. 51, 53, were taken by *Twenty* parties. The Stay Order, Vol. II, pp. 82, 83, in effect made all those appellants Petitioners here, but *Mrs. Bostwick is the only one of them who was a party to the Macclenny Turpentine Company case*. This fact was well known to opposing counsel. Then why his repeated assertions to the contrary? The answer is obvious. In the first several pages of his brief he is trying to put over the argument that by Petitioners' Answers filed in the District Court and by their petition for writ of certiorari, they are now trying to "re-litigate" questions that were settled by the State Court between the *same* parties. In the case of *National Licorice Co. v. N. L. R. Board*, 309 U. S. 350, 362, 84 L. Ed. 799, 809, this Court restated the following rule:

"It is elementary that it is not within the power of any tribunal to make a binding adjudication of the rights in personam of parties not brought before it by due process of law."

These Twenty petitioners have not had their day in Court because the Orders of the District Court (affirmed by the Circuit Court of Appeals) striking their Answers

denied their right to be heard according to the "Law of the Land" as defined by Mr. Webster and approved by this Court. *Hovey v. Elliott*, 167 U. S. 407, 42 L. Ed. 215.

Assertions That the Facts of This Case Are the Same as in the State Case Are Error

At page 8 of Respondent's brief it is urged as a companion argument that the state case involved "the same substantial facts." This argument ignores the essentially different facts as to P. F. McDermott and his heirs pointed out at pages 28, 29 and 68 of our first brief. That argument ignores the essentially different facts regarding complete abandonment and damage by flooding to Mrs. Bostwick's parcel #23 and the parcels owned by Jacksonville Heights Improvement Company pointed out at pages 39 to 43 of our first brief. The argument also ignores the facts pleaded here and pointed out pages 47 to 55 of our first brief involving a complete new plan of drainage for nearly all of the "Gunnery Range" area involved in C. C. A. cases #11354 and #11355 (D. C. Cases 481 and 527). Our first brief pointed out that in undertaking to authorize and contract for such new plan of drainage the district, through its supervisors and engineers, completely ignored what is now Section 298.27, Florida Statutes 1941. No such facts were presented in the *Macclenny Turpentine Company* case. Many other dissimilar facts could be pointed out. Moreover in the late case of *City of Stuart v. Green*, 23 So. 2d 831, 833, decided November 16, 1945, the Supreme Court of Florida again said,

"We have said repeatedly that laches must be tested by the facts of the particular case, that it does not depend merely upon the lapse of time."

Therefore, if Federal Courts in the administration of 40 U. S. C. A., Section 258a, are bound by State Court de-

cisions in all respects, the foregoing rule reiterated since the Macclenny Turpentine Company decisions means that the District Court and the Circuit Court of Appeals were both wrong in not considering and deciding the case presented by petitioners on its merits.

Petition Determines Scope of Review

At page 3 of the brief for respondents, counsel makes the erroneous argument that the Federal Questions presented by the petition for writ of certiorari were raised for the first time in a petition for rehearing and may not now be considered by this Court because that petition was simply denied. All the cases cited in support of that argument were cases decided by state appellate courts and not cases decided by Courts of Appeal. Many decisions of this Court have held that under Rule 38 of this Court the Court's consideration of a case will be "limited to the questions specifically brought forward by the Petition for Writ of Certiorari". *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U. S. 175, 82 L. Ed. 1273. In that case the Court explained that the specifications of error in a supporting brief do not expand but merely serve to identify and challenge rulings upon which is grounded ultimate decision of the matters involved. The ruling of the case just cited was reaffirmed in the case of *National Licorice Co. v. National Lab. Rel. Board*, 309 U. S. 350, 357, 84 L. Ed. 799, 807, footnote 2. In the case at bar seven questions were presented by the Petition, pages 6 to 12 inclusive. The supporting brief set forth six Assignments of Error, pages 33 and 34. We think that the questions presented by the Petition and Assignments of Error come within the rule set forth in the *General Talking Picture Corporation* case. The petitioners did not have the gift of prophecy so as to make it necessary for their counsel to warn the Court of Appeals

against an erroneous application of the doctrine of *Erie R. Co. v. Tompkins* in these non-diversity of citizenship cases. Furthermore it was expressly held by this Court in *Friend v. Talcott*, 228 U. S. 27, 57 L. Ed. 718, as stated in the first head note (L. Ed.) reading as follows:

“Questions passed upon by the circuit court of appeals are open for consideration in the Federal Supreme Court on writ of certiorari, though not raised in, nor considered by, the trial court.”

Under this rule the Petitioners are undoubtedly entitled to a consideration of the several questions presented by the petition having to do with a misapplication of the doctrine announced in the *Erie R. Company* case. In like manner the Petitioners had no way of anticipating what other errors might be committed by the Court of Appeals. Hence under Rule 38 it is the particular function of the petition for writ of certiorari to point out wherein the decision of the Circuit Court of Appeals was erroneous. That is what the petition in the instant case undertakes to do. It is true substantially the same questions were presented by the Petition for Rehearing to the end that the Court of Appeals might itself correct its own errors, but that effort on the part of the Petitioners did not detract from their right to have those errors considered when the same questions are properly presented by their petition for the writ.

If it were necessary to go further back in the record it will be found in the motion for trial on adverse claims, Vol. II, pp. 6 to 12, particularly in paragraphs 4, 5, and 9, that the Petitioners there asserted, in the District Court, some of the same questions which are brought forward in the Petition. That motion was filed in October, 1944. Still later and four days after certiorari was denied as to the *State* case, the Petitioners filed an amended answer on January 19, 1945, Vol. II, pp. 33 to 45, and again specifically

invoked the protection of the 14th Amendment. The same is true of the Statement of Points relied upon in the Court of Appeals, Vol. II, pages 53 to 56.

**Argument on Nonapplicability of *Erie R. Co. v. Tompkins*
Remains Unanswered by Respondents' Brief**

At bottom of page 3 and top of page 4 of Respondents' Brief it is said,

“The opinion of the Court of Appeals rests largely upon the decision of the Florida Court in the *Macclenny* case, supra, and upon *State v. Covington*.”

State v. Covington, as explained in our first supporting brief, page 26, was a *quo warranto* case where the Supreme Court of Florida simply held that the district had, “at least a defacto existence”. Our first brief made it plain that the petitioners here made no further contest on that question. Therefore the quotation last above, from page 3 of the Respondents' Brief, amounts to a concession that the Court of Appeals, and for that matter the District Court, held themselves bound by the doctrine of the *Erie R. Company* case. Indeed, the Court of Appeals, as quoted on page 5 of our Petition, expressly stated that the course of that Court had been charted by the Supreme Court of Florida “and we must follow it”. After making the concessions aforesaid counsel for Respondents makes no response whatsoever to questions I, II and III of the Petition, pages 6 and 7, and they make no response whatsoever to the “A” and “B” reasons relied on, pages 18 and 19 of the Petition, and they make no response whatsoever to our argument under the first Assignment of Error, pages 35 to 38, of our supporting brief. Those several parts of the Petition and first supporting brief are resubmitted as being wholly unanswered by the Respondents.

There Is No Such Inconsistency in the Pleadings of Petitioners as Would Justify Denial of Writ of Certiorari

At page 6 of brief for Respondents, counsel asserts there are three reasons why writ of certiorari should not be issued. As a first reason they contend that the petitioners by their pleadings, appearing in the record, have taken inconsistent positions. That argument is unsound. It is true that on June 1st, 1942, certain parties to this suit, including some of the petitioners here, moved the Court to defer action on the adverse claims, then presented by answers on file, until the State case of *Macclenny Turpentine Company, et al.*, then pending, was determined. It is also true that these petitioners and their undersigned counsel then expected that the State court would decide, *on their merits*, the attacks on drainage taxes which were being levied by the Baldwin Drainage District against certain lands (not involved here) lying on the Western side of the district; also that the State court would, in deciding the merits of such attacks, construe the statutory provisions involved. But in this they were disappointed and as pointed out at page 13 of the petition filed here the Supreme Court of Florida by-passed the real defenses or real bases of attack made by the Bill of Complaint and undertook to dispose of the case on the basis of supposed,

“Acquiescence on the part of those (former owners of the lands involved) who could have protested.”

We have heretofore pointed out that the majority opinion of the Supreme Court of Florida did not construe or apply what are now Sections 298.07 and 298.27, Florida Statutes 1941, or any other Section of the Florida Drainage Law relied upon to sustain the attacks made in the State court. Neither did the majority opinion of the Supreme Court of Florida recognize or decide any point urged under the 14th

Amendment. Therefore it is perfectly clear that when the petitioners on January 19, 1945, filed their amendments to their answers, Vol. II, pp. 33 to 45, specifically invoking the protection of the 14th Amendment, they were not attempting to re-litigate what had already been decided by the Supreme Court of Florida. On the contrary they were attempting to have the District Court decide the Federal questions, properly invoked by said amendments, that had been left undecided by the Florida Supreme Court.

On the subject of inconsistency we may appropriately quote from the brief of Messrs. Patterson & Harrell filed for the Respondents when petition was filed here in case #714 for writ of certiorari in the *Macclenny Turpentine Company* case. The same counsel, who now argue that the Supreme Court of Florida decided everything, asserted at pages 3 and 4 of said brief,

"No Federal question is presented for decision."

.

"There is no specific reference to any particular section of the Federal Constitution and in every instance the charge is a violation of 'State and Federal Constitutions.' ' ' "

At page 8 of the same brief the same counsel further say,

"This record not only shows that no Federal question was set up or claimed in a proper manner and time, but that *no such question was decided by the State Supreme Court either expressly or by necessary intendment.*" (Italics ours.)

That line of argument made in the former case and of which this Court may take judicial notice is directly contrary to the argument made on pages 6 and 7 of the brief for Respondents filed in the case at bar. By denial of writ of certiorari in the *Macclenny Turpentine Company* case this

Court presumably agreed with the argument above quoted from the brief of counsel in said former case. Having made such an argument and having gotten a favorable decision thereon it appears to us that the able counsel, who made the argument, are now estopped to shift their position when the shoe is on the other foot.

Acquiescence and Laches Are No Answer to the Federal Questions Presented in These Cases

Reason "E" for granting the Writ, stated at page 21 of the Petition, is that the Court of Appeals misapplied the decisions of this Court in *Shepard v. Barron*, and *Utley v. St. Petersburg* and like cases. On pages 21 and 22 of the Petition we distinguished those cases from the facts in the case at bar and admitted by the attacking motions of the Respondents.

Under Error No. 6, discussed pages 68 to 72 of our supporting brief, we further discussed the error of the Court of Appeals in the misapplication of the doctrine of estoppel and cited many decisions of this Court and other authorities to sustain our position. Opposing counsel makes no attempt to answer our argument on the merits. He makes no contention that *Shepard v. Barron*, and *Utley v. St. Petersburg* were not sufficiently distinguished. He makes no effort to show the inapplicability of other authorities, cited page 22 of our Petition, and still others cited and quoted pages 70 to 72 of our supporting brief. Ordinarily acquiescence and estoppel are questions of state law and do not involve a Federal question, provided the question of estoppel or acquiescence has fair support and is not so unsound as to be essentially arbitrary or merely a device to prevent a review of the other grounds of the judgment, including Federal questions raised by the same record. These limitations were fully recognized and stated in

Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157, 164, 165; 61 L. Ed. 644, 649.

Additional cases, cited the first half page 9 of respondents' brief, are just as inapplicable to the admitted facts of this record as are *Shepard v. Barron* and *Utley v. St. Petersburg*. This fact is illustrated by *Pierce v. Somerset Ry. Co.* In that case the complaining parties had for a long period of time acquiesced without any objection to the operations of *Somerset Ry. Co.*, during which time the railway line was extended, net earnings were distributed in the form of dividends and otherwise. The conditions and the relationships of the parties interested in the railway had materially changed. Complaining parties claimed to be trustees for certain interests in the property so operated by the railway. The doctrine of estoppel was applied to the peculiar facts of that record. The case at bar presents no such facts. In *Eustis v. Bowles*, discussed in *Pierce v. Somerset Ry. Co.*, the complaining party had accepted dividends under the insolvency proceedings involved. Hence he was held to have waived his right to claim that the discharge, obtained under subsequent laws, violated the obligations of his contract. According to the old adage he could not have his cake and eat it, too. No such case is presented by the record at bar. In the *Enterprise Irrigation District* case the adversaries of the canal company likewise by their own conduct precluded themselves from questioning the canal company's claims. No such case is presented by the record at bar.

It is true that the Supreme Court of Florida cited *Tulare Irrigation District v. Shepard*, 195 U. S. 1, but that case is just as far from having any pertinency here as the case of *Shepard v. Barron* distinguished in our petition pages 21 and 22. The *Tulare* case was a suit against the irrigation district by certain bondholders to obtain a judgment on

matured coupons. It was not a case to enforce irrigation taxes. Two property owners intervened and undertook to make common cause with the irrigation district in trying to repudiate the bonds on technical grounds, after the bonds had been purchased and held by bona fide owners for "full value." In the meantime the intervening property owners had received "full benefit" of the irrigation project with respect to their own property and had otherwise acquiesced and approved the project including the sale of negotiable bonds to the plaintiffs for "full value". We have no such case here; on the contrary *the lands of petitioners received no benefits whatsoever* in the lower part of the Cecil Field area and in addition the excess water discharged into the upper streams flowing through that area flooded the lands annually more than they would have been had there been no drainage improvement anywhere in the district. In short, there was a *complete failure of consideration* for all the taxes sought to be imposed against the properties of petitioners. *District of Columbia v. Thompson*, 281 U. S. 25, and other cases cited pages 44 and 45 of our supporting brief.

**The Validity or Invalidity of a Lien for Drainage Taxes
May Be Either a Question of State Law or a Question
of Federal Law Depending upon the Case Made by the
Pleadings.**

At page 9 of brief for Respondents, counsel takes the erroneous position that the question of the validity of the drainage taxes is *solely a question of State law*. Such an error is obvious, otherwise there could be no situation to which the 14th Amendment could apply. In *Stewart v. Daytona, etc., Inlet Dist.*, 94 Fla. 859, 114 So. 545, a district tax was held void because the statute under which the same was levied carried no proper limitation as required by Sec-

tion 3, Article IX of the State Constitution—a case of State law. In the case of *Dixon v. City of Cocoa*, 106 Fla. 855, 143 So. 748, a tax was held void because the assessment carried an insufficient description—a question of State law.

On the other hand this Court held in *Myles Salt Co. v. Board of Commissioners*, 239 U. S. 478, 60 L. Ed. 392, as stated in the first headnote (L. Ed.) reading:

“The contention that a State law as administered and justified by the highest court of the state violates the Federal Constitution presents a Federal question which will support a writ of error from the Federal Supreme Court to the state court, although the state law as written is not attacked.”

To like effect *Gast Realty & I. Co. v. Schneider Granite Co.*, 240 U. S. 55, 60 L. Ed. 523, and *Road Improvement Dist. No. 1 v. Mo. P. R. Co.* 274 U. S. 188, 71, L. Ed. 992, first and second headnotes.

In the case of *Duncan v. St. John's Levee & Drainage Dist.*, 69 F. 2d, 342 8 CCA, the opinion supporting the 3rd headnote, among other things, said:

“It was the view of the trial court that property cannot be taxed for benefits when none exist. Any attempt by taxing authorities to impose a burden without a compensating advantage is power arbitrarily exerted, ‘amounts to confiscation and violates the due process provision of the Fourteenth Amendment’. *Myles Salt Co. v. Iberia Drainage District*, 239 U. S. 478, 36 S. Ct. 204, 60 L. Ed. 392.”

The cases cited on page 10 of Respondents' brief do not support the proposition stated middle of that page. In the case of *U. S. v. Certain Lands*, 130 F. 2d, 782, the question involved was whether there could be any pro rate of general taxes for the year during which the property was taken over for public use. There was no attack whatsoever

on the validity of the taxes involved. The Court held there could be no pro rate because under the State statute the lien for the taxes attached as of January 1st, of the year in which the property was taken. Therefore, the general taxes levied for that year had to be paid in full out of the award. Again in *Hobo v. U. S.* 94 F. 2d, 351, there was no attack on the validity of the general taxes in question. The sole matter determined was whether the successor tax collector was entitled to demand payment from the fund in Court. The Court answered in the affirmative because as an official the new collector simply stepped into the shoes of his predecessor. The citation of such cases simply ignored all of the attacks upon both installment taxes and maintenance taxes made by the amended answers of Petitioners and those parts of their original answers adopted and brought forward by the amended answers. Those attacks upon the validity of the taxes embraced attacks upon statutory grounds and upon the 14th Amendment. It is familiar law that when the Court has jurisdiction to determine Federal questions based upon the 14th Amendment it also has jurisdiction to determine questions based upon the State statutory law.

On page 10 of Respondents' brief they make the repeated assertion that the Florida court held the taxes valid, referring, it is assumed, to the holding in the *Macclenny Turpentine Company* case. As a matter of fact the Florida Supreme Court did not hold valid the taxes, involved in that case as to other lands owned by other parties, but simply held that the parties in that case *could not be heard* on the questions of validity or invalidity presented by their bill because of,

"Acquiescence on the part of those who could have protested." In this new case not dependent on diversity of citizenship, the Federal district court and the Court of

Appeals had an independent responsibility to decide all questions involved in these cases on their merits irrespective of the conclusion as to acquiescence reached and stated by the majority of the State court in the *Macclenny Turpentine Company* case.

The Merits of Major Questions Presented in Our Petition and Amplified by Our Supporting Brief Have Been Left Unanswered by Respondents' Brief.

As we have seen thus far the whole effort of counsel for Respondents is to build up a barrier of acquiescence or estoppel to *preclude* a consideration of any question presented by our Petition and supporting brief on the *merits* thereof.

As to questions I, II, and III of the Petition pages 6 and 7 thereof and as to Error No. 1, pages 35 to 39 of our supporting brief, the brief for respondents says nothing, except to assert that the case of *U. S. v. Certain Lands*, 129 Fed. 2d, 577, is not in point. The fact remains however that the Second Circuit Court of Appeals in that case specifically held as stated in the second headnote, quoted at page 20 of our Petition. It was there distinctly held that the law of New York with regard to allowance of interest in condemnation suits did not apply and that the Federal Court administering 40 U. S. C. A., Section 258a, would apply a Federal Rule for the reason that the application of that Federal Statute *involved a question of Federal law and not State law*. No attempt whatever is made by counsel for respondents to answer any of the other cases cited by us in connection with questions I, II, and III of the Petition or cited by us in connection with Error No. 1 discussed in the supporting brief beginning page 35.

Again the brief for Respondents is entirely silent with respect to question number IV stated in our Petition at

page 8, and Error No. 2 discussed in our supporting brief beginning page 39. The same is true with respect to question number V stated in our Petition at page 9, and our discussion of Error No. 3 beginning page 47 of our supporting brief. Likewise Respondents' brief is entirely silent with respect to questions VI and VII of our Petition pages 11 and 12, and of Errors No. 4 and 5 discussed pages 58 to 68 of our supporting brief. The complete silence of the brief for Respondents with regard to these questions amounts to an admission of their soundness and amounts to an admission by opposing counsel of his inability to answer the same on their merits.

Before closing this discussion we wish to bring to the Court's attention another recent decision of the Supreme Court of Florida which, we believe, squarely sustains our contention of a *failure of consideration for both installment taxes and maintenance taxes*, because of complete abandonment, no original construction and no maintenance coupled with long insolvency and inability to perform, as pointed out pages 44 to 47 and pages 65 to 68 of our supporting brief. In the case of *City of Stuart v. Green*, 23 So. 2d, 831, rehearing denied December 17, 1945, more than a year since the *Macclenny Turpentine Company* case, the Court, in substance, held that after a lapse of 18 years and the passage of a resolution undertaking to approve an indebtedness represented by certain promissory notes and after the passage of an act of the legislature intended to validate said indebtedness and authorize issuance of bond therefor, the city was not precluded by laches or acquiescence from attacking the validity of the notes and procuring their cancellation for failure of consideration. The matter of failure of consideration resulted from the fact that the deed whereby certain properties were attempted to be conveyed for the notes was void because of bad description and because the

contract for the deed to the property was void in that one of the city commissioners was a controlling stockholder of the vendor owner of the property. In support of the 4th and 5th headnotes the Court pointed out that laches must be tested by the facts of each particular case and then said,

“Eighteen years have passed since the transaction under examination was consummated. Even so, it is the same notes then given upon which suit now pends, and any defense to them is still available. *Beekner, et vir. v. L. P. Kaufman, Inc., et al.*, 145 Fla. 152; 198 So. 794.”

The case of *Beekner v. Kaufman, Inc.*, cited as authority, specifically held, third headnote,

“A defense should be as long-lived as cause of action.”

That is exactly our contention in this case as expressed middle of page 44 of our supporting brief. Hence as held in *District of Columbia v. Thompson, supra*, the defense of failure of consideration against the collection of special assessments is as long-lived as the claim for such assessments. That is simple justice. The Supreme Court of Florida in the late *Stuart* case sustained that proposition. In fairness to that Court it must be said that when we presented the *Macclenny Turpentine Company* case we had not, up to that time, found the decision of this Court in *District of Columbia v. Thompson* and the line of cases cited and approved thereby. We now feel confident that if another drainage tax case, such as the one at bar, should come before the Supreme Court of Florida that court would, under the facts pleaded in the case at bar, recognize and enforce the defense of failure of consideration as applied to both installment taxes and maintenance taxes.

We now again respectfully submit that each and every of the questions presented by our petition is meritorious and that the said petition presents sound and sufficient reasons why Writ of Certiorari should issue in this case.

Respectfully submitted,

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Counsel for Petitioners.

(3575)